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In the Supreme Court of the United States

OCTOBER TERM, 1996

FEDERAL ELECTION COMMISSION, PETITIONER

v.

JAMES E. AKINS, RICHARD CURTISS, PAUL FINDLEY, ROBERT J. HANKS, ANDREW KILLGORE, AND ORIN PARKER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

WALTER DELLINGER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

LAWRENCE M. NOBLE
General Counsel
Federal Election Commission
Washington, D.C. 20463

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A. In our petition for a writ of certiorari, we explain that the "major purpose" test announced by this Court in *Buckley* v. *Valeo*, 424 U.S. 1, 79 (1976) (per curiam), serves to ensure that occasional election-related disbursements do not subject an organization to the comprehensive disclosure requirements, covering *all* receipts and disbursements, that are applicable to political committees under the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.* Pet. 15-17. We further explain (Pet. 17-20) that the justifications for the "major purpose" test apply with equal force whether the disbursements that trigger the reporting requirements

are independent expenditures or direct contributions. The court of appeals in this case therefore erred in holding that the "major purpose" test is inapplicable to any organization that makes more than $1,000 in campaign contributions in a calendar year.

Respondents defend the court of appeals' judgment, but on a quite different theory. In respondents' view, the "major purpose" test serves to identify those disbursements that are "expenditures" within the meaning of the FECA. They contend (Br. in Opp. 4 n.3) that any disbursement whose "major purpose" is the election or defeat of a candidate is an "expenditure," and that "[a]ll organizations that make independent expenditures exceeding $1,000 in a year are political committees, except to the extent a [distinct] constitutional exemption * * * applies." Respondents argue that the relevant inquiry should focus on the "major purpose" of a particular disbursement, not on the "major purpose" of the organization as a whole.

That view cannot be reconciled with this Court's precedents. In *Buckley*, this Court stated that "[t]o fulfill the purposes of the Act [the words 'political committee'] need only encompass organizations that are under the control of a candidate *or the major purpose of which is the nomination or election of a candidate*." 424 U.S. at 79 (emphasis added). Grammatically, the word "organizations" is the only possible antecedent for the phrase "of which." Respondents' view of the "major purpose" test is further undermined by the ensuing pages of the *Buckley* opinion, which addressed the term "expenditure" as it applies to independent expenditures made by individuals and by groups other than "political committees." See *id.* at 79-82. The Court construed the term as "reach[ing] only funds used for communications that

expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80 (footnote omitted). The Court did not suggest that it was articulating two different tests for an independent expenditure—*i.e.*, one employing the "express advocacy" requirement when applied to individuals and to groups other than political committees, and another employing the "major purpose" test to identify those disbursements counting towards the $1,000 threshold for political committee status.

This Court's subsequent decision in *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), makes it particularly clear that the relevant inquiry focuses on the organization's major purpose, not on the major purpose of an individual disbursement. As our petition explains (see Pet. 16-17), the *MCFL* plurality deemed it "undisputed" that MCFL was not a "political committee" because "[i]ts central organizational purpose [wa]s issue advocacy," 479 U.S. at 252 n.6, notwithstanding the fact that the organization had made FECA "expenditures" of nearly $10,000 during the calendar year in question, *id.* at 244, 248-251. The majority observed that, "should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." *Id.* at 262. *MCFL* makes clear that it is "the organization's major purpose," *ibid.*—not the major purpose of any particular disbursement—that is dispositive of the "political committee" inquiry.

Moreover, a test focusing on the "major purpose" of a particular disbursement would not satisfactorily address the practical and constitutional problems potentially created by the Act's political committee

provisions. A political committee is required to make comprehensive disclosures of *all* of its receipts and disbursements, even those that bear no direct relation to electoral campaigns. See, *e.g.*, 2 U.S.C. 434(b)(3)(G), 434(b)(6)(B)(v). There is consequently a significant danger that small amounts of campaign-related expenditures by an organization may trigger a far-reaching obligation to disclose non-campaign-related receipts and disbursements, including receipts and disbursements used for issue advocacy. A narrowing construction of the term "expenditure" alone would not alleviate that risk.[1]

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[1] Respondents also suggest (Br. in Opp. 13) that, "[t]o the extent forced disclosure of non-campaign activities is a constitutional concern, the appropriate remedy would be to exempt *these* activities from disclosure, not the campaign contributions." That argument is flawed in several respects. First, it is inconsistent with *Buckley* and *MCFL*. Those decisions responded to constitutional concerns by announcing a limiting construction of the term "political committee," not by exempting (or authorizing the Commission to exempt) such committees from the requirement that they disclose all of their receipts and disbursements. Second, although it might be possible to segregate an organization's campaign-related *disbursements*, political committees are also required, *inter alia*, to disclose all of their *receipts*, which are not normally earmarked for campaign or other activity. The approach proposed by respondents therefore would not fully address the practical and constitutional difficulties that the "major purpose" test was intended to resolve.

Finally, the determination that an organization is not a political committee does not serve to "exempt" its campaign contributions from the FECA's disclosure requirements. As our petition explains (Pet. 4, 22), contributions aggregating more than $200 from any person to a candidate or political committee must be reported by the recipient. See 2 U.S.C. 434(b)(3). Although certain coordinated expenditures could be made in a manner that would make it difficult for the recipient candidates to learn of such contributions and to be able to report them (see Br. in Opp. 13-14 n.11), that potential barrier to a candidate's complete reporting of coordinated expenditures made on his behalf exists even where the contributors are individuals.

Respondents make little effort to reconcile their position with this Court's own articulation, in *Buckley* and *MCFL*, of the criteria for political committee status. They rely instead (Br. in Opp. 3) on two lower court decisions—*United States* v. *National Committee for Impeachment*, 469 F.2d 1135 (2d Cir. 1972) (*NCFI*), and *American Civil Liberties Union, Inc.* v. *Jennings*, 366 F. Supp. 1041 (D.D.C. 1973) (*ACLU*), vacated as moot *sub nom. Staats* v. *American Civil Liberties Union, Inc.*, 422 U.S. 1030 (1975)—that were cited by this Court in *Buckley*. See 424 U.S. at 79 n.106 ("At least two lower courts, seeking to avoid questions of unconstitutionality, have construed the disclosure requirements imposed on 'political committees' * * * to be nonapplicable to nonpartisan organizations."). Respondents' approach is flawed in two respects.

First, the lower court decisions on which respondents rely are hardly as unequivocal as respondents suggest. The Second Circuit's opinion in *NCFI* contains language supporting both approaches to the identification of "political committees." On the one hand, the *NCFI* court stated that it would "construe the Act to apply only to committees soliciting contributions or making expenditures the major purpose of which is the nomination or election of candidates," 469 F.2d at 1141—language suggesting that the inquiry should focus on the purpose of particular receipts and disbursements. On the other hand, the

court observed that, under its construction of the FECA, federal officials enforcing the Act "will be forced to glean the principal or major purpose of the organizations they seek to have comply with the Act." *Id.* at 1142. The court noted as well that "the words of the Act seem to indicate that Congress' concern was primarily with groups organized or at least authorized by a particular candidate and whose principal focus is a specific campaign." *Id.* at 1140. Those passages suggest that the overall character of the organization should be dispositive of the "political committee" question.

In any event, close analysis of the lower court decisions cited by the *Buckley* Court would be appropriate only if such analysis were helpful in resolving an ambiguity in *Buckley* itself. As we explain above, no such ambiguity exists. Rather, the *Buckley* Court stated unequivocally that an organization will be considered a political committee only if the *organization's* major purpose is campaign activity.[2] The Court reaffirmed that conclusion in *MCFL*. Respondents' apparent view that this Court misconstrued the lower court decisions in *NCFI* and *ACLU* provides no justification for the court of appeals' refusal to accept at face value the Court's interpretation of the Act's "political committee" provision.

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[2] The *Buckley* Court stated that the decisions in *NCFI* and *ACLU* had "construed the disclosure requirements imposed on 'political committees' * * * to be nonapplicable to nonpartisan organizations." 424 U.S. at 79 n.106. This Court evidently interpreted those decisions as focusing on the character of the organization rather than on the character of a particular disbursement.

B. Respondents lack standing to bring their suit. Contrary to respondents' contention (see Br. in Opp. 15), their suit is not properly analogized to one brought under the Freedom of Information Act (FOIA), 5 U.S.C. 552. The gravamen of a FOIA action is that a government agency has breached its legal duty to disclose to the plaintiff information actually in the possession of the government. Respondents, by contrast, challenge the Commission's failure to acquire, through means of an enforcement action, information in the possession of a private party. This Court has recognized that, "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (internal quotation marks omitted).

Respondents also contend (Br. in Opp. 16) that they "meet the non-constitutional, zone-of-interests test for standing." The zone-of-interests test was devised as "a gloss on the meaning of [5 U.S.C.] § 702." *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 395 (1987). Section 702—the judicial review provision of the Administrative Procedure Act (APA)—authorizes suits by persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. 702. While this Court has applied the zone-of-interests test outside the context of APA review, it has "made clear * * * that the breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the generous review provisions of the APA may not do so

for other purposes." *Bennett* v. *Spear*, 117 S. Ct. 1154, 1161 (1997) (internal quotation marks omitted).

The statutory review provision under which respondents' action was brought is narrower than that in the APA: it does not authorize suits by persons "adversely affected," but only by persons "aggrieved" by the Commission's dismissal of a complaint. 2 U.S.C. 437g(a)(8)(A); cf. *Liquid Carbonic Indus. Corp.* v. *FERC*, 29 F.3d 697, 702 (D.C. Cir. 1994) (Federal Power Act provision authorizing judicial review for "[a]ny party * * * aggrieved" is narrower than APA's judicial review provision). Moreover, Section 437g(a)(8)(A) applies in an area—the decision by a government agency not to undertake an enforcement action against a private party—that is typically not subject to judicial review at all. See *Heckler* v. *Chaney*, 470 U.S. 821, 831-832 (1985); *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 616-619 (1973). Those aspects of the Act weigh strongly against respondents' apparent conclusion (see Br. in Opp. 15) that *any voter* would have standing to challenge the Commission's enforcement decision in this case.

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For the reasons stated above, and in our petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

LAWRENCE M. NOBLE
General Counsel
Federal Election Commission

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